

No. 49A04-1305-CT-000267

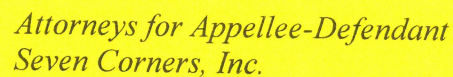


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SUMMARY OF ARGUMENT

The Estate of Eboni Dodson seeks to pursue a *respondeat superior* claim by expanding the boundaries of “scope of employment.” However, well-reasoned and applicable Indiana precedent holds that an employee, while traveling home in his personal vehicle and not subject to serving his employer, is outside the scope of employment. The lower courts’ rulings herein, that an employee’s acts at that point in time cannot give rise to vicarious liability for the employer, properly comports with such precedent.

SUMMARY OF FACTS

Curt Carlson was an employee of Defendant/Appellee Seven Corners, Inc. Carlson voluntarily joined James Krampen, Executive Officer of Seven Corners, Inc., as well as one of Seven Corners’ clients, at the Renaissance Hotel one evening. During this meeting, business was discussed, and Carlson consumed food and alcohol. Appellant’s Appendix (App.) 32-37.

Krampen paid for the group’s dinner and drinks. App. 37. Thereafter, Carlson headed home alone in his personal vehicle. App. 37. Carlson first drove to a Circle K Shell gas station to purchase a cup of coffee. App. 38. He then left the gas station and proceeded toward home. *Id.* The complained-of collision occurred approximately fifteen to twenty minutes after Carlson got in his car and left the Renaissance Hotel. App. 46.

ARGUMENT

A. The Dispositive Issue Here, Under What Circumstances an Employee Subjects His Employer to Vicarious Liability While On His Way to Work or While Going Home, Has Been Squarely Decided in Indiana

Appellant/Plaintiff the Estate of Eboni Dodson ("Dodson") is pursuing a *respondeat superior* claim against Seven Corners, Inc. Dodson argues its claim presents an undecided question of Indiana law. However, while the facts of each case are always unique, Indiana's appellate courts have previously decided the legal issue presented here.

In *Biel, Inc. v. Kirsch* (1959), 240 Ind. 69, 161 N.E.2d 617, Ethel Biel ("Biel") was president of Biel, Inc. Biel routinely drove a vehicle belonging to the corporation (the "company car") home at night, and then back to work again. One morning on her way to work, Biel was driving the company car and became involved in a collision.

Regarding the *respondeat superior* claim, the Indiana Supreme Court stated:

An essential part of the proof necessary to hold the appellant corporation liable was that Ethel H. Biel, **at the time and place of the accident**, was the appellant's corporate agent, acting within the scope of her employment and authority for and on behalf of the corporation as her principal; otherwise no negligence may be imputed to the appellant corporation.

Id. at 70, 161 N.E.2d at 618 (emphasis added). The Court concluded:

There is no evidence that **at the time of the accident** Mrs. Biel was acting within the scope of her employment for the defendant corporation and as its agent. She was on no errand for the corporation, but instead was on her way to her work. ... It is well settled that an employee on his way to work is normally not in the employment of the corporation.

Id., citing Annotation, 52 A.L.R.2d 350, p. 354 and *Frick v. Bickel* (1944), 155 Ind.App. 114, 54 N.E.2d 436; emphasis added. Thus, Biel's alleged negligence could not be imputed to the corporation.

In *Pace v. Couture* (1971), 150 Ind.App. 220, 276 N.E.2d 213, Couture, a truck driver, left the terminal for home in his own tractor. He was thereafter involved in an accident. The lower court had ruled:

It is also a general and universal rule that a person driving to or from work is not within the scope of his agency or employment while he is traveling to and from his employment. [Numerous citations omitted.] ... [T]his Court is of the opinion that the defendant, Southern Express Company, is entitled to summary judgment on the ground that the driver of the vehicle, Peter Couture, *was not acting as its agent at the time the accident occurred.*

Id. at 225, 276 N.E.2d at 216, emphasis added.

The Indiana Court of Appeals affirmed, noting:

[I]t must be established that Peter Couture was *at the time of the collision* acting within the scope of his employment as an employee for the Southern Express Company. *Glenn v. Johnson* (1930), 91 Ind.App. 263, 171 N.E. 18; *Haynes v. Stroh* (1935), 99 Ind.App. 595, 193 N.E.2d 721; *Frick v. Bickel* (1944), 115 Ind.App. 114, 54 N.E.2d 436. It is well settled that an employee on his way home is normally not in the employment of his employer. *Biel v. Kirsch*, *supra*; See also 52 A.L.R.2d 350, p. 354.

Id. at 229, 276 N.E.2d at 218-19, emphasis added.

Accord, *Pursley v. Ford Motor Co.*, 462 N.E.2d 247 (Ind.App.1984):

Our courts have consistently held an employee is not within the scope of his employment while he is travelling to or from his employment. [Citations to *Biel*, *supra*, and *Pace*, *supra*, omitted.] In the instant case, Campbell had left work and was on his way home when the accident occurred. Hence, he was not within the scope of his employment.

Id. at 249.

In *Dillman v. Great Dane Trailers, Inc.*, 649 N.E.2d 665 (Ind.App.1995), Great Dane was Welliever's employer. One Saturday night, an intoxicated Welliever drove from his home toward a Great Dane event, where he was to act as master of ceremonies. En route, Welliever was involved in a collision with D'Angelo. The trial court granted Great Dane's summary judgment motion against the *respondeat superior* claim. The Indiana Court of Appeals affirmed, stating: "The common law rule in this state is that travel to and from work is not considered activity within the scope of employment so as to hold the employer liable for injury caused by an employee's negligence." *Id.* at 667, citing *Biel, supra*.

On D'Angelo's behalf, Dillman advanced several arguments why whether an employee was acting within the scope of his employment should be a jury question. The appellate court disagreed. The court reiterated that a jury question only exists if there are conflicting facts or inferences as to whether the driver was also performing an errand or service for the employer, while on the way to or from work. *Id.* at 668.

A question of fact as to "scope of employment" has also been deemed to exist where the employee causing injury was driving a company-owned vehicle and was on call 24 hours a day. See *Gullett by Gullett v. Smith*, 637 N.E.2d 172, 175 (Ind.App. 1994), citing *State v. Gibbs*, 336 N.E.2d 703 (Ind.App.1975).

At the time and place of the instant collision, Carlson was not performing an errand or service for his employer, was not on call, and was not driving a company-owned vehicle. There was no fact question for a jury here. Dodson's *respondeat superior* claim is controlled by Indiana precedent: the "going and coming" rule. This case does not present an undecided question of law.

B. Indiana Precedent, as Applied Herein by our Court of Appeals, is Consistent with the Foundation and Boundaries of *Respondeat Superior* Liability

As set forth in the cases discussed above, *respondeat superior* liability depends upon whether, **at the time and place of the accident**, the employee was acting within the scope of his employment. Dodson acknowledges that “‘at the time and place of the accident,’ Carlson was not working for Seven Corners...” Petition to Transfer, 7, but Dodson seeks to expand *respondeat superior* to apply here. Dodson's request should be denied. The Indiana Court of Appeals' ruling is consistent with the foundation and boundaries of imputed liability.

Under *respondeat superior*, the employer may become vicariously liable, not for its own act, but for the act of another, its employee. *Biel, Inc. v. Kirsch, supra*, 161 N.E.2d at 618. The basis for an employee's negligence being imputed to the employer arises when, at the time the employee committed the injury, he was acting for the business in doing some part of his job duty, or advancing the business's interests. *Biel, supra* (the employee must be acting as corporate agent); *Pace, supra*, 276 N.E.2d at 216 (same); *Gibbs v. Miller* 1972, 152 Ind.App. 326, 330, 283 N.E.2d 592, 595 (The employee must have been "engaged in a task incidental to his everyday employment," or the employee must have been motivated "to [an] appreciable extent by the purpose to serve the [employer].").

If when he injures another, the employee is in his own car, on his own time, and not subject to performing a duty or service for his employer, he is not at that point benefitting the employer. The justification for imputing the employee's negligence to the employer does not exist at that time.

The well-established and well-founded boundaries of *respondeat superior* liability were properly applied herein by our court of appeals.

C. **Indiana Precedent, as Applied Here, is Consistent with Vicarious Liability Standards for Employers as Set Forth in *Barnett v. Clark***

An employee's negligence may be imputed to the employer if at the time of causing injury, the employee was "engaged in a task incidental to his everyday employment," or was motivated "to [an] appreciable extent by the purpose to serve the [employer]." *Gibbs v. Miller*, 152 Ind.App. 326, 330, 283 N.E.2d 592, 595 (1972).

These boundaries of imputed liability were summarized by the Indiana Supreme Court in *Barnett v. Clark*, 889 N.E.2d 281 (Ind.2008) this way:

The general rule is that vicarious liability will be imposed upon an employer under the doctrine of *respondeat superior* where the employee has inflicted harm while acting "within the scope of employment." [Citations omitted.] And in order for an employee's act to fall "within the scope of employment," the injurious act must be incidental to the conduct authorized or it must, to an appreciable extent, further the employer's business. [Citations omitted.]

Id. at 283.

Dodson argues that the "incidental to the conduct authorized" language quoted above conflicts with application of the "going and coming" rule in this case. Petition to Transfer, 9. Specifically, Dodson argues these words expand the time frame within which an employee may subject an employer to imputed liability, to include times when the employee was not performing any part of his job duties nor intending to serve his employer.

Barnett does not support expanding the time frame as Dodson suggests. In *Barnett*, the plaintiff had sought assistance from her local township trustee's office. A deputy trustee told her she would first have to do some paid bookwork for him, and he later closed her in a room and sexually assaulted her. The Indiana Supreme Court held that the deputy trustee's acts of confinement, sexual assault and rape "were not sufficiently associated with his employment duties so as to fall within the scope of [his employment]." *Barnett, supra*, at 286. The decision went to the nexus or connection between the acts complained of and the duties authorized. It did not speak to work hours versus personal time.

As the Indiana Court of Appeals stated in the decision below, "[t]he doctrine of *respondeat superior* is [still] limited by the 'going and coming' rule." *Dodson v. Carlson*, --- N.E.2d ---, 2014 WL 3695224 (Ind.App.), *2. In *Biel, Inc. v. Kirsch*, the Indiana Supreme Court had stated:

An essential part of the proof necessary to hold the appellant corporation liable was that Ethel H. Biel, at the time and place of the accident, was the appellant's corporate agent, acting within the scope of her employment and authority for and on behalf of the corporation as her principal; otherwise no negligence may be imputed to the appellant corporation.

Id. at 70, 161 N.E.2d at 618. Overlaying *Biel* with *Barnett* yields well-reasoned Indiana precedent:

An essential part of the proof necessary to hold an employer liable is that an employee, at the time and place of the accident, committed acts sufficiently associated with the conduct authorized, or was motivated to an appreciable extent by furthering the employer's business interests; otherwise no negligence may be imputed to the employer.

The “going and coming” rule does not conflict with *Barnett*, and was properly applied here.

CONCLUSION

The Estate of Eboni Dodson’s Petition to Transfer should be denied.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "R. Skiles", followed by a horizontal line.

Richard R. Skiles
Attorney for Appellee, Seven Corners, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of September, 2014, the foregoing was served upon the following persons, by first-class mail, U.S. Postal Service, postage prepaid:

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